ORIGINAL

BEFORE THE

# Federal Communications Commission

WASHINGTON, DC 20554

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| In the Matter of | ) | |
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| 1998 Biennial Regulatory Review — | ) | WT Docket No. 98-205 |
| Spectrum Aggregation Limits | ) | |
| for Wireless Telecommunications Carriers | ) | |
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## COMMENTS OF AIRTOUCH COMMUNICATIONS, INC.

**AIRTOUCH COMMUNICATIONS, INC.**

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## SUMMARY

Two and one-half years have elapsed since the Commission last reviewed the 45 MHz CMRS spectrum cap. As the Commission acknowledges, there have been numerous developments affecting the CMRS marketplace. Current market conditions and technological advances now support immediate elimination of the rule.

Meaningful economic competition exists between CMRS providers. The Commission itself acknowledges the competitiveness of the wireless marketplace. Significant price and service rivalry exists in many markets. Many markets, including several in AirTouch's service areas, have six or seven wireless competitors, and the subscriber market continues to expand rapidly. Customers routinely switch carriers, and innovative services are being developed and promoted. By any reasonable interpretation of the Act, "meaningful economic competition" exists in the wireless industry such that elimination of the spectrum cap is warranted.

Factors other than the CMRS spectrum cap have promoted the competitiveness of the CMRS marketplace. New market entrants, rapid technological changes, and narrowly-focused regulatory requirements have contributed far more to the competitiveness of the industry and to preventing anticompetitive "warehousing" of spectrum than the spectrum cap. The cap is not "necessary" to promote competition.

The competitive market itself renders the spectrum cap superfluous. A predation strategy, whereby one carrier warehouses spectrum for the purpose of precluding another from acquiring spectrum for productive use, is highly unlikely in today's competitive CMRS marketplace. The costs of acquiring spectrum in the marketplace for anticompetitive purposes are prohibitive and simply preclude wireless carriers from pursuing such a strategy.

Other statutory and regulatory measures provide adequate safeguards against anticompetitive behavior and mergers. Mergers and acquisitions involving the largest CMRS incumbents will be subject to antitrust review, and all transfers and assignments of CMRS licenses are subject to the Commission's public interest review. Case-by-case review is now appropriate to ensure that desirable spectrum aggregation is not precluded.

For these reasons, the spectrum cap is unnecessary to promote or preserve CMRS competition. Furthermore, the spectrum cap may arbitrarily limit wireless carriers' ability to meet increasing customer demand for traditional voice services, data and third generation services, and will preclude carriers from recognizing efficiencies — including economies of scale and scope in rural areas — that will serve the public interest. Other existing regulatory measures will promote service deployment to rural and underserved areas.

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## COMMENTS OF AIRTOUCH COMMUNICATIONS, INC.

AirTouch Communications, Inc. ("AirTouch")[1] hereby files comments in response to the Commission's *Notice of Proposed Rulemaking* in the above-captioned proceeding.[2] For the reasons discussed herein, AirTouch submits that the Commission should repeal the 45 MHz CMRS spectrum cap as alternatively proposed in the *NPRM*.[3] Developments in the CMRS marketplace and the existence of meaningful competition

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[1] AirTouch is a global wireless communications company with interests in domestic and foreign cellular, paging, personal communications services, satellite and other operations.

[2] *In the Matter of 1998 Biennial Regulatory Review — Spectrum Aggregation Limits for Wireless Telecommunications Carriers*, WT Docket No. 98-205, *Cellular Telecommunications Industry Ass'n's Petition for Forbearance From the 45 MHz CMRS Spectrum Cap, Amendment of Parts 20 and 24 of the Commission's Rules — Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap*, WT Docket No. 96-59, *Implementation of Sections 3(n) and 332 of the Communications Act — Regulatory Treatment of Mobile Services*, GN Docket No. 93-252, *Notice of Proposed Rulemaking*, FCC 98-308 (released Dec. 10, 1998), 63 Fed. Reg. 70728 (Dec. 22, 1998) ("*NPRM*").

[3] *See id.* ¶ 74; 47 C.F.R. § 20.6; *Implementation of Sections 3(n) and 332 of the Communications Act — Regulatory Treatment of Mobile Services, Third Report and Order*, GN Docket No. 93-252, 9 FCC Rcd. 7988, 8100-8117 (1994) ("*Third Report and Order*").

between CMRS providers today demonstrate that the spectrum cap is not necessary in the public interest pursuant to Section 11 of the Communications Act.[4] Moreover, the circumstances which led to the initial imposition of the spectrum cap no longer pertain and thus the rule should be repealed.

## BACKGROUND/INTRODUCTION

AirTouch has consistently opposed the 45 MHz spectrum cap and, for that matter, any spectrum ownership limitation, as an artificial and arbitrary stricture on CMRS competition.[5] When the spectrum cap was initially proposed, AirTouch warned that the imposition of "unwarranted, prospective regulation of the structure of any market" was unnecessary and risky.[6] AirTouch cautioned that "emerging CMRS services [were] destined to change and evolve in the near future, probably dramatically;" that the demand for such services was "certain to change;" and that incumbent licensees "may be precluded from pursuing promising opportunities because their entry into new services would require more spectrum than the cap would allow."[7] AirTouch also demonstrated that it was unlikely that CMRS licensees could exert market power by aggregating spectrum due to, among other things, the presence of actual and potential providers of CMRS services; the rapid rate of technological change which, in turn, "creates incentive for competitors to 'leap frog' each other with introduction of technological advances" and

4 47 U.S.C. § 161.

5 AirTouch Comments in GN Docket No. 93-252, filed June 20, 1994, at 7.

6 *Id.*

7 *Id.* at 8-10.

enhance spectrum capacity; and the risk of loss of the license.[8] AirTouch supported its arguments with economic analysis demonstrating the minimal risk of any CMRS licensee exercising market power via spectrum aggregation.[9]

The Commission nevertheless rejected AirTouch's arguments and studies.[10] Instead, the Commission summarily determined that the 45 MHz spectrum cap was necessary "to prevent licensees from artificially withholding capacity from the market" and to "discourage anticompetitive behavior while at the same time maintaining incentives for innovation and efficiency."[11] At the time, most of the country received CMRS services from two cellular carriers, and the Commission posited that the cap would "facilitate development of competitive markets for wireless services."[12] Thereafter in 1996, the Commission further concluded that the cap was "needed specifically to prevent cellular licensees from gaining too great a competitive advantage over new entrants to the wireless telephony market" and that incumbents "have a competitive position that is superior to that of any new market entrant [and] strong incentives to preserve that existing advantage."[13]

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8 *Id.* at 10-13.

9 *Id.* at Attachments I (affidavit of Jerry A. Hausman) and II (affidavit of R. Preston McAfee and Michael A. Williams).

10 *See Third Report and Order* at 8104 (rejecting AirTouch arguments); AirTouch Comments in GN Docket No. 93-252, filed June 20, 1994, at 13.

11 *Third Report and Order*, 9 FCC Rcd. at 8108.

12 *NPRM* ¶ 2 (citing *Third Report and Order*, 9 FCC Rcd. 8104-05).

13 *Amendment of Parts 20 and 24 of the Commission's Rules — Broadband PCS*
(continued...)

As the Commission recognizes, "there have been several developments that have significantly affected CMRS markets" since the spectrum cap was first adopted in 1994.[14]

> Since [adoption of the cap], we have issued new licenses authorizing the use of additional CMRS spectrum. In many areas of the country, broadband PCS auction winners have also pursued the opportunities presented by newer digital technologies and have begun to provide an expanded array of mobile services. Cellular and broadband PCS providers, in turn, have also begun to encounter competition from a nationwide SMR company whose capabilities have been enhanced by acquiring new spectrum rights and its own digital strategy. Competition is also emerging from providers of paging services, data services, wireless e-mail and other non-voice services.[15]

Section 11 of the Act now requires the Commission to "determine whether any such regulation is no longer *necessary* in the public interest as the result of *meaningful economic competition* between providers of such service."[16] Furthermore, it is unquestioned that the Commission must act to reexamine its rules "if a significant factual predicate of a prior decision . . . has been removed."[17] Two and one-half years have passed since the Commission last reviewed the CMRS spectrum cap, and AirTouch

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13 (...continued) *Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap*, WT Docket No. 96-59, *Report and Order*, 11 FCC Rcd. 7824, 7873 (1996).

14 *Id.*

15 *NPRM* ¶ 30.

16 47 U.S.C. § 161(a)(2) (emphasis added).

17 *See, e.g., Bechtel v. FCC*, 957 F.2d 873, 881 (D.C. Cir. 1992); *California v. FCC*, 905 F.2d 1217, 1230 (9th Cir. 1990); *WWHT, Inc. v. FCC*, 656 F.2d 807, 819 (D.C. Cir. 1981); *Geller v. FCC*, 610 F.2d 973, 979 (D.C. Cir. 1979).

submits that current market conditions and technological advances support immediate elimination of the rule.

## DISCUSSION

### I. MEANINGFUL ECONOMIC COMPETITION BETWEEN CMRS PROVIDERS MANDATES THAT THE COMMISSION ELIMINATE THE CMRS SPECTRUM CAP

Section 11 requires that the Commission eliminate or modify the spectrum cap if "meaningful economic competition" between CMRS providers exists such that the cap is not necessary to serve the public interest.[18] The Commission now routinely touts the competitiveness of the CMRS industry as an example of its stated commitment to promoting competition in telecommunications services markets. For example, in discussing the competitiveness of the telecommunications industry, Commissioner Ness recently declared:

> The benefits of competition have been even more dramatic in commercial mobile radio. Just a few years ago, a wireless call commonly cost 50 or even 75 cents a minute. You also paid hefty roaming fees. But when the first PCS provider challenged the cellular incumbents, rates plummeted 25%. They dropped even further as the 4th, 5th, or even 6th providers joined the fray.[19]

Similarly, Commissioner Powell stated in connection with adoption of the *NPRM* that it is time to "take a sober and realistic look at the CMRS ownership limitations in light of

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[18] *See* 47 U.S.C. §§ 161(a), (b).

[19] Remarks of FCC Commissioner Susan Ness Before the Federal Communications Bar Ass'n, Washington, D.C., January 20, 1999.

the current and foreseeable competitive environment in the wireless market."[20] As discussed herein, the cap is no longer necessary to promote CMRS competition and, indeed, will disserve the public interest if maintained.

The Commission has recently described most CMRS markets "as either *fully competitive* or face *sufficient competition* [such] that it is the public interest to relax some Commission policies traditionally applied to non-competitive markets."[21] As recognized by the Commission there is "price and service rivalry in many markets." Further, and again in the Commission's words, "on average prices are falling markedly, service quality is improving, and new services are becoming available."[22]

In its *Third CMRS Competition Report*, the Commission reported that as of June 1998 approximately 273 BTAs covering 87 percent of the nation's total POPs had three or more CMRS providers offering service; 71 of these BTAs had at least four providers, 51 BTAs had five providers, and 13 BTAs had six providers.[23] In addition, as of October 1998, *seven* broadband CMRS providers were operating in at lest four U.S. markets — two of which (Phoenix and Tucson) are served by AirTouch, and two of

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20 *NPRM*, Separate Statement of Commissioner Powell, at 1.

21 *See 1998 Biennial Regulatory Review — Elimination of Part 41 Telegraph and Telephone Franks, Notice of Proposed Rulemaking*, CC Docket No. 98-119, FCC 98-152, ¶ 13 (rel. July 21, 1998) (emphasis added).

22 *NPRM* ¶ 34.

23 *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation act of 1993, Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services, Third Report*, FCC 98-91, released June 11, 1998, at 18 ("*Third CMRS Competition Report*").

which (Tampa and Jacksonville) are served by PrimeCo Personal Communications, L.P.[24] Within AirTouch's and PrimeCo's other service areas, there are six competitors in the Atlanta, Seattle, Denver, Portland, Albuquerque, Minneapolis-St. Paul and Houston areas.[25] Furthermore, the total wireless subscriber market continues to increase at a rapid pace, from 44 million to 55 million in 1997 alone, to over 60 million today.[26]

Moreover, customers have meaningful competitive choices and exercise them. Customers are not locked into one single carrier, and they routinely switch wireless carriers on the basis of price and service quality.[27] Carriers have also utilized innovative means of expanding the wireless market, including the use of prepaid wireless plans and innovative pricing.

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24 *NPRM* ¶ 35 n.100. PrimeCo is controlled by AirTouch and Bell Atlantic Corporation, both of which hold a 50 percent general partnership interest.

25 *See Sprint Jumps into Atlanta's Wireless Market*, ATLANTA JOURNAL AND CONSTITUTION, Jan. 6, 1999; *Sprint Begins Wireless Phone Service in Houston, The Houston Chronicle*, Nov. 24, 1998; *U S West offers single number for all phones*, SEATTLE TIMES, Oct. 20, 1998, http//seattletimes.com/news/business/ htlm98/phon_102098.html; *US West Enters Wireless Competition in St. Paul, Minn. Area*, SAINT PAUL PIONEER PRESS, July 16, 1998; *Yakking It Up: For Wireless Services, Talk Is Cheaper, but Competition Rages*, WALL STREET JOURNAL, April 27, 1998 (Denver), http://interactive.wsj.com/edition/current /articles/SB893395456508289000.html.

26 *See Third CMRS Competition Report* at 14; www.wow-com.com/consumer/ faqs/faw-general/cfm#one.

27 *See High Churn Again Dogs Powertel*, COMMUNICATIONS DAILY, October 30, 1998 (4.5% monthly churn rate); *Slow-Growing Wireless is Stable Financial Contributor for Centurytel*, WIRELESS TODAY, Oct. 27, 1998 (2.3% monthly rate); *Microcell's End-of-September Base Hits 180,000 Mark*, COMMUNICATIONS DAILY, October 19, 1998 (2.8% monthly rate); *High-MOU Individuals, Men Seen as More Prone to Churn*, WIRELESS TODAY, Sept. 3, 1998 (10% of respondents surveyed switched carriers in past year); *Lack of Loyalty Can Hurt: Study Pegs U.S. Wireless Churn Potential at 38 Percent*, PCS WEEK, Aug. 26, 1998.

In addition, new and innovative services are being developed. For example, the development of wireless data services is in its early stages but is expected to have significant consumer applications and demand.[28] Similarly, wireless local loop opportunities — which may provide meaningful local exchange competition — are also being pursued. Thus, competition is thriving in wireless telecommunications and there remain numerous opportunities for mobile wireless entry.

For the foregoing reasons, it is clear that "meaningful economic competition" exists in the CMRS marketplace.[29] While Congress did not specifically define "meaningful economic competition," it should be interpreted under its plain meaning and in the context of the 1996 Act's objectives. As such, the Commission should examine whether the 1996 Act's objectives of "promot[ing] competition and reduc[ing] regulation in order to secure *lower prices* and *higher quality services* for American telecommunications consumers and encourage the *rapid deployment of new telecommunications technologies*" have been obtained in the CMRS marketplace.[30]

The competition unquestionably present in the CMRS marketplace is providing exactly the benefits Congress envisioned — lower prices for wireless services,

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[28] *See Third CMRS Competition Report* at 62-63; *Future of Smart Phones Isn't Waiting*, MOBILE PHONE NEWS, Jan. 4, 1999; Eoin Licken, *New Data Age: Now, Portable Phones Aren't Just for Talking*, INTERNATIONAL HERALD TRIBUNE, Jan. 22, 1999, *available at* www.iht.com/IHT/TECH/tek0122199d.html.

[29] *See* 47 U.S.C. § 161(a)(2).

[30] *See* Pub. L. No. 104-104, 110 Stat. 56 (1996) (preamble to the Act) (emphasis added); Joint Explanatory Statement of the Committee of Conference, H.R. Conf. Rep. No. 104-230, at 1 (1996).

new and innovative service offerings, and the rapid deployment of services.[31] Accordingly, AirTouch submits that "meaningful economic competition," by any reasonable interpretation of the Act, clearly exists in the CMRS marketplace.

## II. THE CMRS SPECTRUM CAP IS NOT NECESSARY TO PRESERVE COMPETITION IN MOBILE VOICE MARKETS

The Commission relies heavily on the presumption that the 45 MHz spectrum cap has facilitated the development of CMRS competition. Market-based and regulatory factors other than the spectrum cap, however, may in fact have been more relevant to the development of the dynamic CMRS marketplace. In any event, the spectrum cap is not *now* necessary to promote or preserve competition and, indeed, maintenance of the restriction would disserve the public interest in the future.

### A. Factors Other than the CMRS Spectrum Cap Have Promoted the Competitiveness of the CMRS Marketplace

The Commission requests comment on the extent to which the cap "may have promoted competition" and "how evidence of emerging competition should be factored into [its] assessment" in this proceeding.[32] The Commission concludes in this regard that "the spectrum cap has been *useful* in promoting competition," that the cap "*helped* to promote the likely emergence of at least three new competitors in each market" and, on a going-forward basis "*may well* continue to be useful to promote

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31 *See Third CMRS Competition Report* at 16-26.

32 *NPRM* ¶ 35.

competition in at least certain areas."[33] Section 11, however, requires a higher standard — the spectrum cap must be *necessary* to promote competition.[34]

Moreover, AirTouch again submits that other, more compelling factors have promoted — and will continue to promote — CMRS competition. Indeed, the factors AirTouch discussed prior to adoption of the spectrum cap — new market entrants, rapid technological changes, and narrowly focused regulatory requirements such as build-out benchmarks — have all facilitated the emergence of a dynamic, highly competitive CMRS marketplace independent of the spectrum cap.

Thus, the Commission should avoid overstating the importance (if any) of the CMRS spectrum cap to the development of today's highly competitive CMRS marketplace. The Commission must also acknowledge the possibility that other actions, including its allocation and auction of broadband PCS spectrum in blocks of 30 MHz or

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33 *Id.* ¶¶ 35-36 (emphasis added). In this regard, the Commission expresses particular concern regarding CMRS deployment in rural areas. *Id.* ¶¶ 5, 36, 44-46. Over one year ago, however, the Commission advised Congress that it had "facilitated the delivery of new services to rural and underserved areas" by providing rural telcos with "favorable opportunities" to provide wireless services through auctions and partitioning. *FCC Report to Congress on Spectrum Auctions, Report*, WT Docket No. 97-150, FCC 97-353, released Oct. 9, 1997, at 25. These efforts have and will continue to facilitate wireless deployment and service opportunities in rural areas.

34 *See New England Public Communications Council Petition for Preemption Pursuant to Section 253*, 11 FCC Rcd 19713, ¶ 25 (1996) (interpreting "'necessary' to foster the overall *pro-competitive, de-regulatory framework that Congress sought to establish through the 1996 Act* and the directive in section 253 to remove barriers to entry") (emphasis added). Just as Congress sought to limit states' discretion to impose regulatory barriers in enacting Section 253, it sought to limit *the Commission's* discretion to impose regulations on competitive telecommunications industries.

less,[35] and buildout and substantial service requirements,[36] have played a significant role in preventing anticompetitive "warehousing" of CMRS spectrum, and that technological advancements, including the digitalization of wireless services, have done far more to promote efficient spectrum use than the spectrum cap. Without resolving the precise cause(s) for today's competitive wireless marketplace, the fact that this competition exists compels repeal of this rule which, if continued, has the potential to diminish customer choice and service innovation, with little or no corresponding public interest benefit.

### B. Competitive Market Forces Render the 45 MHz Spectrum Cap Superfluous

The Commission created a competitive market structure by licensing spectrum so as to authorize at least three PCS providers with 30 MHz spectrum blocks, plus ESMR provider Nextel, to directly compete with licensed cellular providers in any given geographic area. The Commission also licensed other, smaller, 10 MHz PCS spectrum blocks to carriers who compete with cellular, PCS and ESMR providers as well as in niche service markets. The Commission has appropriately allowed that structure to be altered through transfers, partitioning and/or disaggregation as licensees respond to increases in market demand and competitive pressures from other carriers.[37] These types of transfers can be both efficient and pro-competitive.[38] The only legitimate reason for a

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35 *See PCS Reconsideration Order*, 9 FCC Rcd. 4957 (1994).

36 *See* 47 C.F.R. § 24.203.

37 *See* 47 C.F.R. §§ 24.714, 24.839.

38 *See Geographic Partitioning and Spectrum Disaggregation by Commercial Mobile Radio Services Licensees and Implementation of Section 257 of the*
(continued...)

spectrum cap is to prevent inefficient or anti-competitive consolidation of spectrum — *i.e.*, to prevent a carrier from acquiring spectrum solely for the purpose of "warehousing" it — effectively denying its productive use to a competitor in order to obtain market power. AirTouch submits that there are a number of reasons why this scenario is extremely unlikely, rendering the function of the spectrum cap superfluous.

It is well recognized that such "predation" strategies are unlikely to be economically viable except under special circumstances. In an inefficient or anti-competitive transaction a wireless carrier would, by definition, have to absorb the cost of acquiring the spectrum without expecting to be able to recoup those costs at competitive market prices. In order for such a spectrum acquisition to be inefficient or anticompetitive, the spectrum aggregation would have to have been premised upon the wireless carrier's ability to earn supra competitive returns by virtue of the fact that spectrum is now less available to competitors. Assuming that such a scenario is even possible — given that the Commission already reviews the pro- or anticompetitive impact of mergers or spectrum transfers — it is an unlikely strategy for a wireless carrier.

Having created a competitive mobile marketplace, wireless carriers are now focusing extensive resources on building out their networks, upgrading those networks to digital, and in some cases investing in new, advanced technologies. Falling prices further require wireless carriers to cut costs in order to maintain profit margins. Carriers are focused on winning new customers, retaining existing customers, and

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[38] (...continued)
*Communications Act: Elimination of Market Entry Barriers, Report and Order and Further Notice of Proposed Rulemaking*, 11 FCC Rcd. 21831, ¶ 2 (1996).

running their businesses efficiently. There is little room for carriers to absorb additional expenses, particularly those of the magnitude involved in acquiring enough spectrum to reduce competition in the market to the point where excessive returns are possible.

Moreover, acquiring additional spectrum that will not be put to productive use produces no benefits for the wireless carrier unless the number of market participants is reduced significantly. Indeed, one economist has noted that there can be effective competition with as few as two wireless providers.[39] At the least, to be truly anticompetitive the consolidation would likely have to eliminate more than one potential competitor. Today, however, with up to seven carriers in a given market, the costs of engineering (much less obtaining regulatory approval of) such a consolidation are likely to be extraordinary and out of the reach of any given mobile operator.

Thus, it is the prohibitive transaction costs of acquiring new spectrum through transfer, not the spectrum cap, that is primarily responsible for — and will continue to preserve — today's competitive market structure. Having initially licensed a number of competitors, the Commission need not rely on anything other than the workings of the market, supplemented by appropriate review of license transfers, to maintain a competitive wireless marketplace. The potential for anticompetitive consolidation without the spectrum cap is extraordinarily small, while retaining the cap has significant potential to diminish customer choice and service innovation.

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[39] *U.S. v. Western Electric*, CA No. 82-0192, Affidavit of Jerry A. Hausman, at 10 (D.D.C. July 29, 1992).

### C. Other Statutory and Regulatory Measures Provide Adequate Safeguards Against Anticompetitive Behavior and Mergers

CMRS providers have always operated subject to the nation's antitrust laws and subject to separate Commission review of anticompetitive acquisitions under the Communications Act.[40] Thus, even assuming *arguendo* that the CMRS spectrum cap has substantively shaped the current CMRS marketplace, given the existence of other regulatory and statutory safeguards, AirTouch submits that the cap is no longer "necessary" to the Commission's public interest objective of promoting CMRS competition. Elimination of the spectrum cap will not "open the floodgates" to a wave of anticompetitive spectrum aggregation.

Mergers and acquisitions of involving the largest CMRS incumbents must still withstand Department of Justice antitrust review.[41] Potential antitrust violations or unlawfully anticompetitive conduct, and the attendant risk of the loss of license eligibility, constitute a powerful deterrent to anticompetitive behavior.[42] In addition, the Commission's public interest review and merger analysis of transactions under Sections

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40 *See United States v. AT&T Corp.*, Case No. 1:98CV03170 (D.D.C. filed Dec. 30, 1998), final judgment entered (D.D.C. Dec. 30, 1998) (merger of AT&T and TCI challenged under Clayton Act, 15 U.S.C. § 18, and subjected to conditions regarding parties' CMRS interests in overlapping geographic markets); 47 U.S.C. §§ 214, 308, 310(d).

41 *See* Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. § 18; Department of Justice/Federal Trade Commission Merger Guidelines, 4 Trade Ret. Rep. (CCH) § 13104; *see also 1998 Biennial Review — Repeal of Part 62 of the Commission's Rules, Notice of Proposed Rulemaking*, CC Docket No. 98-195, FCC 98-294, ¶ 7 (rel. Nov. 18, 1998) (proposing elimination of rules where other Title II provisions and antitrust laws "exist to guard against this particular type of anticompetitive behavior").

42 *See* 47 U.S.C. §§ 313-314.

310(d) and 214(a) provide a substantial impediment to any genuinely anticompetitive merger or acquisition.[43] Moreover, where unlawful anticompetitive conduct occurs, CMRS providers are subject to Section 208 complaint procedures.[44] A case-by-case review is already required by law and will prevent anticompetitive behavior without significant expenditure of agency resources.

In sum, while the Commission posits that "the spectrum cap has served the purpose of constraining *undesirable* erosion of existing competition through mergers or acquisitions in major markets," it must recognize that the cap also inevitably constrains "desirable" mergers and acquisitions that would otherwise serve the public interest.[45] The Commission has a variety of existent review and enforcement tools to prevent anticompetitive conduct in the wireless market and the spectrum cap is not needed for this purpose.

### D. The Spectrum Cap Is Unnecessary to Preserve or Promote CMRS Competition and will Disserve the Public Interest If Maintained

As discussed above, the spectrum cap is not necessary to promote — or preserve — competition in the CMRS marketplace. Moreover, in the highly competitive and rapidly-evolving wireless marketplace, the spectrum cap limit is essentially an

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43 *See NPRM* ¶¶ 73-74, 78; 47 U.S.C. §§ 214(a), 310(d); *Applications of NYNEX/Bell Atlantic*, 12 FCC Rcd. 19985 (1997); *AT&T/Teleport, Memorandum Opinion and Order,* CC Docket No. 98-24, FCC 98-169, ¶ 20 n.66 (rel. July 23, 1998). To the extent that authorities other than the Commission have less authority "to protect competition in cases where competition may not yet be adequately developed," *see NPRM* ¶ 78, the Commission's Section 310(d) public interest review fills any such jurisdictional "gap."

44 *See* 47 U.S.C. § 208.

45 *See NPRM* ¶ 37 (emphasis added).

arbitrary number imposed upon mobile service providers that will disserve the public interest by inserting inefficiencies into the market.

In general, mobile services should be provided by the entity best able to use its spectrum to provide its licensed service to meet customer demand. Customer demand and wireless providers' spectrum needs are subject to change and thus an arbitrary spectrum limit can disserve the public interest. In addition to the expanding market for mobile voice, the wireless marketplace is changing to meet consumer demand for high speed mobile data services and so-called "third-generation" ("3G") services, as well as other innovative service offerings.[46] The explosive growth in both wireless subscribers and wireless usage indicate that in 1994 wireless constituted 2.2% of total telecommunications minutes, expected to grow to 7.3% by the year 2000. This reflects a migration of traffic from landline networks to mobile networks. Wireless penetration is expected to reach 50% of the U.S. market by 2005. The increased demand for mobile service will constrain capacity on those networks most successful in meeting this demand, potentially limiting service quality and harming consumer interests if an artificial spectrum cap is maintained.[47] Thus, maintenance of the spectrum cap is not only unnecessary to promote the Commission's public interest objective of promoting competition, but may in fact disserve other public interest objectives.

In this regard, the arbitrariness of the rule was acknowledged by the Commission in its WCS proceeding, in which it determined that:

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[46] *See id.* ¶ 43; *supra* note 28.

[47] Merrill Lynch, *The Next Generation II*, March 10, 1998.

> [A]pplying the cap and excluding many existing CMRS providers from acquiring WCS licenses would . . . carry significant potential costs for consumers. With their existing base station infrastructures, CMRS licensees may be the most efficient users of WCS spectrum because economies of scope may be large in the provision of new services combined with the provision of conventional mobile voice CMRS.[48]

As the Commission now acknowledges, this same rationale may well apply to a CMRS carrier's provision of fixed or data-based services over aggregated CMRS spectrum.[49] The spectrum cap, however, precludes a carrier from recognizing such efficiencies and thus may in fact hinder the competitive development of wireless services, as well as prevent public benefits from such offerings.

Lastly, retaining the spectrum cap will not promote CMRS competition in rural areas. Alternative measures, such as the Commission's decision to allow the flexible partitioning of broadband PCS service areas and spectrum disaggregation, enforcement of the Commission's build-out rules for smaller BTA broadband PCS licenses, and enhancing CMRS carriers' eligibility for universal service support will do more to advance the deployment of new, competitive services to underserved rural areas.[50] Indeed, as the Commission suggests, the spectrum cap may instead have the

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48 *Amendment of the Commission's Rules to Establish Part 27, the Wireless Communications Service ("WCS"), Report and Order*, 12 FCC Rcd. 10785, ¶ 91 (1997).

49 *See NPRM* ¶ 42 ("we anticipate the argument that [absent the cap] existing providers would be able to finish new services at lower cost [because they] . . . can capitalize on existing facilities (*e.g.*, towers) or other assets (*e.g.*, brand name recognition, established customer base")).

50 *See* 47 C.F.R. §§ 24.203(a)-(b) (buildout requirements), 24.714 (partitioning/disaggregation); *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, *Memorandum Opinion and Order and Further Notice of*
(continued...)

unintended effect of actually precluding the development of economies of scope and scale by carriers that would facilitate the provision of service to higher-cost rural areas.[51]

**CONCLUSION**

For the reasons stated herein, the Commission should eliminate the 45 MHz CMRS spectrum cap. While the Commission has set forth a variety of possible rulemaking options in the *NPRM*, elimination of the rule altogether is warranted as a matter of sound policy, administrative law, and pursuant to the Commission's Section 11 obligations.[52]

Respectfully submitted,

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50 (...continued)
*Proposed Rulemaking*, FCC 98-278, ¶¶ 42-53 (rel. Oct. 26, 1998).

51 *See NPRM* ¶ 46.

52 This is not to say that the elements of Section 10 forbearance are not present — they are. *See* CTIA Petition for Forbearance, filed September 30, 1998, at 7-28. Because the spectrum cap applies only to a narrow class of CMRS providers, AirTouch submits that elimination of the rule, rather than Section 10 forbearance is the more straightforward and appropriate means of regulatory relief. *See NPRM* ¶¶ 63-70 (discussing forbearance option), ¶¶ 74-78 (discussing elimination of rule).